No. 222.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

LUCIAN WOODWORTH, FRANK D. BROWN and GEORGE N. CLAYTON, *Plaintiffs in Error and Appellants.*

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error and Appellee.*

No. 222.

ON A CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHT CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

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Omaha Printing Company.

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I.

STATEMENT OF FACTS.

This cause is now brought before this Court on a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit. The suit originally was brought by the Northwestern Mutual Life Insurance Company against Lucian Woodworth, as principal, and Frank D. Brown and George N. Clayton, as sureties, on a supersedeas bond, to recover damages and costs which the insurance

company alleged had been sustained by reason of an appeal taken by Lucian Woodworth from a decree of foreclosure and sale of real estate in Omaha, Nebraska.

The case was tried before the Circuit Court of the United States for the District of Nebraska, Hon. W. H. Munger presiding, and judgment rendered in favor of the plaintiff. A writ of error was sued out and also an appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Both proceedings were adopted because of the uncertainty as to the proper method of procedure.

The case was submitted in due course to the United States Circuit Court of Appeals at St. Louis, and after considering the case, the Court of Appeals certified one of the questions or propositions of law arising therein to this Court.

The Statement of Facts, together with the question certified, is found on pages 1 to 3 of the Certificate, as follows:

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 27th day of December, 1900, hereby certifies that upon the record on file in said court in the above-entitled causes wherein Lucian Woodworth, Frank D. Brown and George N. Clayton are plaintiffs in error and the Northwestern Mutual Life Insurance Company is defendant in error, and Lucian Woodworth, Frank D. Brown and George N. Clayton are appellants and the Northwestern Mutual Life Insurance Company is appellee, and which causes are now pending before this court on writ of error to, and appeal from the circuit court of the United States for the District of Nebraska, the following facts appear, namely:

On August 26, 1896, the Northwestern Mutual Life Insurance Company filed its bill of complaint in the circuit court of the United States for the District of Nebraska against Lucian Woodworth and others to foreclose a mortgage, given by Woodworth and his wife to said company, upon certain real estate situated in the State of Nebraska. A decree on said bill was entered on December 3, 1896, in said circuit court, foreclosing the mortgage, directing that a master in chancery of the court sell the premises and upon confirmation of the sale by the court execute a deed to the purchaser and ordering that the purchaser of the premises at said sale be put in possession thereof and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, should deliver possession to the purchaser on production of the master's deed of said premises and a certified copy of the order confirming the report of said sale, after such order had become absolute. On February 14, 1898, said real estate was sold by the master under said decree and was purchased at said sale by the Northwestern Mutual Life Insurance Company for $39,152, a sum less than the amount of the debt secured by the mortgage and the costs in the suit. The master made his report of sale to the court on February 15, 1898. On March 15, 1898, said circuit court confirmed said report of sale, directed that the master convey said real estate to the purchaser at said sale, awarded a writ of possession to put said purchaser in possession thereof and rendered a deficiency judgment for the sum of $2,696.90 and interest in favor of the Northwestern Mutual Life Insurance Company and against said Woodworth. On March 30, 1898, said Woodworth was allowed an appeal from this order of confirmation to the United States circuit court of appeals for the eighth circuit and thereafter, on April 8, 1898, he filed his appeal bond in the sum of $5,500 with Frank D. Brown and George N. Clayton as sureties thereon, which bond was conditioned for the payment of "all damages and costs which it (the Northwestern Mutual Life Insur-

ance Company) may incur by reason or on account of said appeal" and worked a supersedeas of the order of confirmation. The United States circuit court of appeals on January 24, 1899, affirmed said order of confirmation of sale and on March 29, 1899, its mandate was duly issued to, and filed in said circuit court. On June 19, 1899, the deficiency judgment and the costs taxed in said cause in the United States circuit court of appeals were fully paid and satisfied. On September 16, 1899, the defendant in error, the Northwestern Mutual Life Insurance Company, filed its petition in said circuit court against Lucian Woodworth, and the sureties on said appeal bond, Frank D. Brown and George N. Clayton, alleging, among other things, that the possession and use of said real estate was withheld from said company by reason of the superseding of the order of March 15, 1898, during the pendency of the appeal therefrom, that the value of such use and possession during the pendency of said appeal amounted to $3,750, and praying that Woodworth and the sureties Brown and Clayton be cited to appear and show cause why judgment *judgment* should not be summarily entered against them for said $3,750 and interest and costs. On September 16, 1899, an order to show cause against said Woodworth, Brown and Clayton was made on said petition as prayed for therein and on October 2, 1899, they filed their showing in resistance to said petition, alleging that "damages for the rents and profits of the premises, or use and detention thereof pending appeal, are not recoverable on a supersedeas bond, and that the bond in question was not given as security, or for the payment of rents and profits, or the use or detention of the property pending appeal" and praying for the dismissal of said petition. On December 9, 1899, said circuit court entered a judgment and decree against the plaintiffs in error, Woodworth, Brown and Clayton, as prayed for in said petition. Afterwards, in due season, to wit, on January 31, 1900, said last named judgment and decree having been rendered on December 9, 1899, the record in the

proceedings on said petition was removed by writ of error and also by appeal to the United States circuit court of appeals for the eighth circuit where it still remains, the cause being as yet undecided.

And the said United States circuit court of appeals hereby certifies, that to the end that it may properly decide said case, it desires the instruction of the Supreme Court of the United States upon the following question or proposition of law arising therein which is duly raised and presented by the record in said case, said question being as follows:

Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser entitled after that order has been affirmed on the appeal to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed.

II.

ARGUMENT.

Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser entitled after that order has been affirmed on the appeal to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed?

We think the case of *Kountze vs. the Omaha Hotel Co.*, 107 U. S. 378, is decisive of the question certified to this court. The bond in the case at bar provides for the payment of all *damages and costs* which may be incurred by reason of said appeal. The bond in the Kountze case was much stronger and more binding in its language, for it provided for the payment of damages for *use and detention* of the property during the pendency of the appeal, also the *costs of suit and just damages for delay.* The bond in the case at bar merely covers the damages and costs which may be incurred by plaintiff on account of the appeal.

There was no attempt in the original mortgage to pledge the rents and profits. The building itself was deemed amply sufficient to secure the amount loaned. Insurance and Investment Companies loaning money always take sufficient security to cover default, litigation, trial, appeal and the time necessarily involved. If a man wants

to borrow $50,000 from any of these Companies, he has to give security valued at not less than $150,000. The Insurance and Investment Companies take all of these delays into consideration. The owner of the building was entitled to the rents, both at common law and under the Nebraska Statutes.

Sec. 55, Chapter 73, Compiled Statutes of Nebraska, is as follows:

Sec. 55. (Legal title in mortgagor.) In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof.

The mortgagor retains the legal title and *right of possession*, unless there be a stipulation to the contrary. Inasmuch as under the plaintiff's foreclosure proceedings it was not seeking the possession of the property and was not entitled thereto, but only to a sale of the mortgaged property, it could not suffer any damages until it had acquired that property, and this it could do only by purchase at a sale thereof and the delivery of the sheriff's or master's deed in pursuance thereof, ~~and the delivery of the sheriff's or master's deed in pursuance thereof.~~

Sec. 853 of Title 27 of Code of Civil Procedure, which title relates to foreclosure of mortgages, Compiled Statutes of Nebraska, page 1327, is as follows:

"Sec. 853. (Deed to purchaser—Effect.) Deeds "shall thereupon be executed by such sheriff, which shall "vest in the purchaser the same estate that would have "vested in the mortgagee if the equity of redemption had "been foreclosed, and no other or greater; and such deeds "shall be as valid as if executed by the mortgagor and

"mortgagee, and shall be an entire bar against each of "them, and all parties to the suit in which the decree for "such sale was made, and against the heirs respectively, "and all persons claiming under such heirs."

This statute has been interpreted by the Nebraska Supreme Court in the case of *Hoagland vs. Lowe*, 39 Nebr., 397, and *John A. Orr vs. Charles A. Broad*, 52 Nebr., 490. The Court in the latter case holding that a mortgage of real property in the State of Nebraska does not convey any title or vest any estate before or after conditions broken, but merely creates a lien on the property, and the mortgagor of the real property retains the legal title and is entitled to the possession thereof until confirmation of a sale under a decree of foreclosure of the mortgage *and a deed made pursuant thereto*, and such right of possession carries with it the proprietary interest in the rents and profits of the real estate.

Again, by the very decree in this case, the possession of the property in question was to remain in the mortgagor, and the mortgagee or purchaser at the sale was not to have possession, or be entitled to possession, until the production of the master's deed.

On page 1 of the Certificate, in the statement of facts, it is said, after stating the terms of the decree, that:

"A master in chancery of the court sell the premises, and upon confirmation of the sale by the court execute a deed to the purchaser and ordering that the purchaser of the premises at said sale be put in possession thereof and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, *should deliver possession to the*

purchaser on production of the master's deed of said premises."

So, by the terms of the decree itself, the possession of the premises in question, and consequently all rights and benefits, and all issues, rents and profits derived therefrom, belonged to the mortgagor until the production of the master's deed.

The mortgagor by taking his appeal is only exercising his legal rights. We cannot do better than to adopt the language as found in the Omaha Hotel Co. case, *supra.*

"In the case of a mortgage, the land, is in the nature of a pledge; and it is only the land itself—the specific thing—which is pledged. The rents and profits are not pledged: they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that 'in the absence of stipulation to the contrary, the mortgagor retains the legal title and right of possession.' The plaintiff, in this case, was not entitled to possession, nor to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing—the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not cov-

ered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly:

The mere delay of the sale for the purpose of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a personal action against the debtor, and this may be the defendants in the suit, or some other person. The rule of Court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where they are many outstanding bonds which have to be called in and verified. The sale in such cases is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt.

As it is the specific thing, the land itself, and not the rents and profits, that constitute the pledge, the delay of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incidental disadvantage or inconvenience, but in our judgment it is not

a legal damage *contemplated* by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in considerable amount may well be required, and if actual deterioration and waste supervenes, the amount may properly be recovered.

In addition to these general considerations, a careful examination of the 29th Rule will show that in cases like the present it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are, "indemnity in all such cases (where the property in controversy necessarily follows the event of the suit) is only required in an amount sufficient to secure the sum *recovered* for the use and detention of the property, and the costs of the suit, and just damages for delay," etc. "The sum recovered for use and detention?" here referred to, means the sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower, and replevin, etc., and the phrase "just damages for delay" refers to those damages arising from the delay occasioned by the proceedings in error or appeal, which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words "use and detention" do not assist us, as they relate to a cause or recovery in the original judgment.

There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgages. Courts of Equity always have the power, where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and pre-

serve not only the corpus, but the rents and profits for the satisfaction of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party, in order to have the benefit of an appeal, should be obliged to give security to account for the intermediate rents and profits of his own property."

This case has been approved in the following cases:

The Sidney, 47 Fed., 260.

Banks vs. McGahan, 45 Fed., 28.

Trust Co., vs. M. K. & T. Ry., 36 Fed., 221 (226).

the court saying in the latter case "Suppose this foreclosure proceeding should pass to a decree and the defendant appeal, its bond on appeal would be no protection to the mortgagee in respect to rents and profits. This is settled in the case of *Kountz vs. Hotel Co.*"

This ruling has never been modified or criticised. It is the logical interpretation of the language of rule 29, Supreme Court Rules, under which rule Superedeas bonds are given. It is provided under section 853 of the Code of Civil Procedure of the State of Nebraska above quoted, that when sales are made under foreclosure of mortgages, the deed shall be issued and made by the Sheriff *Until this deed is issued, the title and right of possession rests and is vested in the mortgagor.* It is not until the deed passes that the purchaser at the sale is vested with any title. It is only upon the execution and delivery of the deed that the title passes from the mortgagor to the purchaser at the sale. The deed has never been issued in

this case. The appeal was taken from the order of confirmation of the sale.

In argument in the Court of Appeals an attempt was made to distinguish between an appeal from an order of confirmation of sale and an appeal from a decree. No such distinction can logically be made. The owner of property is entitled to the rents and profits of the same until final transfer of the title by the Master's deed. This precise point has been decided by the Supreme Court of Nebraska in the case of *Philadelphia Mortgage & Trust Co. vs. Gustus et al.*, 55 Neb. 433, (77 N. W. R. 1107). That was an action to foreclose a mortgage upon real estate. A decree was entered and a sale of the land had, and, on motion, an order of confirmation was entered in the district court. Objections to the confirmation were presented for the mortgagors, which, on hearing, were overruled, and from the order of confirmation the mortgagors appealed. In deciding the case the Supreme Court said:

"The appeal and bond, if they did not vacate the order of the district court, superseded, suspended, or rendered it inoperative. The purchaser acquired no rights, and the applicant was not divested of his title to and rights in the land. *Tootle vs. White*, 4 Neb., 401; *Bank vs. Green*, 8 Neb., 296; *Bank vs. Green*, 10 Neb., 133. All things remained as before the sale and subsequent order of the district court, and will so remain and exist until a decision in and by this court of the matter appealed. The order of the district court, by the perfection of the appeal, became ineffectual as to all other purposes for which it was made, and it certainly does not seem unfair to say that it was not of force or effect as against the right to

redeem; nor does it appear unwarranted to construe the section of the Code in its reference to time to have indicated the date when the order shall become forceful and of full operation, which it cannot until this court has so decreed."

See also the case of *Robert Huston vs. Alfred Canfield et al.*, 57 Neb., 345, and *Clark vs. M. K. & T. Trust Co.*, 59 Neb., 53.

The mortgagor was in possession of the property all during the pendency of the proceedings. No demand for possession or claim for the rents, issues and profits was made by the mortgagee. No action was taken until the original case was affirmed in the Court of Appeals and a deed issued, when, for the first time, a demand for the rents, issues and profits was made.

It is now well settled that "a mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession."

Teal vs. Walker, 111 U. S., 242.

Decisions covering cases in ejectment have been cited by counsel as overruling the principle established in the Kountze case. Even in such cases it has been questioned by this Court whether the bond covers rents and profits accruing pending the writ. *Roberts vs. Cooper*, 19 How. 373. But cases like the one at bar and cases in ejectment are clearly distinguishable by the court in the Kountze case *supra*, for it is there said:

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he

is entitled to immediate possession and to the reception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar or dollar's worth, is so much of the plaintiff's property of which he is deprived. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him."

The defendant in the original case, Mr. Lucian Woodworth, had the right to prosecute his appeal. It was one of the things in contemplation at the time of the execution and delivery of the mortgage. His title to the premises did not become divested until the deed was delivered. An order confirming a sale is not sufficient. At this point of time an appeal was taken. The mortgagor's legal title was not and could not be divested, and the title did not vest in the mortgagee or the purchaser at the sale until the deed was delivered.

"As between the mortgagor and mortgagee or purchaser under foreclosure of a mortgage, the owner of the equity of redemption is entitled to the rents which become due down to the period when the purchaser under the decree of sale becomes entitled to possession, and this possessory right accrues on the production to the occupant of the premises of the referee's or sheriff's deed."

Clason vs. Corley, 5 Sandf. 447.

"Until the deed is delivered, the rights of the parties remain unchanged."

Whalen vs. White, 25 N. Y. 462.

Harrigan vs. Golden, 41 App. Div. 423.

In the case of *Whalen vs. White, supra*, the Court of Appeals of New York, said:

"*Clason vs. Gorly*, (5 Sandf. S. C., 447) was a well-considered case, in which Judge Sanford, with his usual care, examined the rights of purchasers at judgment sales under decrees of courts upon foreclosure of mortgages before and after the confirmation of the sale, and the rights and liabilities of tenants who were parties to the foreclosure suit and bound by the decree. It was held in that case—Judges Duer and Bosworth concurring—that the owner of the equity of redemption in land mortgaged was entitled to the rents which became due down to the period when the purchaser under the decree of sale became entitled to the possession of the land; which right accrued upon the production to the occupant of the premises of the master's or sheriff's deed and a certified order confirming the report of the sale after it became absolute. * * * * * By the mere sale under the judgment in the foreclosure suit, no change of title was affected."

"The purchaser takes the rents from the time he receives his deed."

Mitchell vs. Bartlett, 51 N. Y., 447.

In this last case the deed was delivered on August 2nd, 1865, and it was contended that the deed related back and took effect so as to vest the legal title to the premises in the plaintiff as of the 1st day of November, 1864, subject to all rents and incumbrances thereon for taxes, assessments and other incumbrances accrued after that date, and that the plaintiff became entitled to the rents of the premises for the period intervening between November 1st, 1864, and August 2nd, 1865. But the Supreme Court would not allow this contention and dissented from the doctrine claimed, and decided that the legal title cannot

vest under a deed before its delivery under any circumstances.

We think that the case of *Gilman et al. vs. Illinois & Mississippi Telephone Co.*, 91 U. S. 603, is instructive and pointed in authority, and presents with great force the reasons for the rule with reference to the right of the mortgagor to receive and hold the rents, issues and profits until the deed is delivered and his possession has been taken from him. The Court, speaking by Mr. Justice Swayne, says:

"The civil law is the springhead of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong vested the fee, subject to be divested by the discharge of the debt at the day limited for its payment. If default was then made, the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing, and the mortgage only as an incident and security. * * * * *

It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver, and clothe him with the duty of taking charge of the road and receiving its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed, and possession delivered over to the vendee.

Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime. It follows that neither, during that period, was in any wise affected by the action of the court. * * * * *

A mortgagor of real estate is not liable for rent while in possession. 2 Kent's Com., 172. He contracts to pay interest, not rent. In *Chinnery vs. Black*, 3 Doug. 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said: 'Until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profit made.'"

We confidently submit that under the clear and undisputed rule of law as established by this Court, the parties to the bond in question cannot be made liable for the rents and profits accruing while the parties to this action were pursuing their legal rights and remedies. Such damages were never in contemplation and have never been allowed.

Respectfully submitted,

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